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## THE ROOMS WHERE IT HAPPENED

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## THE ROOMS WHERE IT HAPPENED

*Keith Fogg*\*

In 1998, I was the District Counsel, Virginia-West Virginia, in the Office of the Chief Counsel of the Internal Revenue Service (IRS). Before the IRS reorganized in 2000, after Congress enacted the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98),<sup>1</sup> the IRS field operation, and therefore Chief Counsel's field operation, was divided into districts that often mirrored states or combinations of states.<sup>2</sup> Each district was a self-contained unit headed by a District Director who oversaw all of the examination, collection, criminal investigation, and almost all other IRS operations within the district. As the District Counsel, I headed an office of attorneys that provided legal advice to the IRS employees in our district and served as the attorney to the person serving as the IRS District Director, Virginia-West Virginia.

My office was located in Richmond, Virginia, about one-hundred miles from Washington, D.C. Several things came together to cause me to participate in the events leading up to RRA 98, as well as the IRS guidance projects immediately thereafter. In this Article, I will discuss four discrete segments of my contact with the legislation, which twenty-five years later remains the biggest procedural revision of the Internal Revenue Code (Code) of my lifetime.

I cannot remember with certainty the order of these four events. So, I will not discuss them in chronological order. Rather, I have placed the most significant of the events at the beginning and the end. My involvement with

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<sup>1</sup> Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685.

<sup>2</sup> I.R.S., HISTORICAL HIGHLIGHTS OF THE IRS, <https://www.irs.gov/newsroom/historical-highlights-of-the-irs> (last visited Dec. 6, 2022) (describing at year 2000 the "geographic based structure").

the legislation does not have the importance of a drafter, a staffer, a testifier, or others intimately involved in making the sausage on the Hill. Still, I spent a day with the staffers who, in their pursuit of evidence of IRS abuses, summoned IRS employees to Congress so they could question them, and decide whether to highlight that case before the Senate Finance Committee. Separately some language I drafted, as well as language I inspired, made its way into RRA 98. The memories have faded some with time, but most remain fairly sharp because of their uniqueness to me and my practice of law.

### I. THE DAY OF TESTIMONY

Sometime in 1997, Senator William V. Roth Jr. from Delaware went on the weekly TV news show *60 Minutes* to display the volume of mail he had received about IRS abuses and to talk about fixing the agency.<sup>3</sup> Perhaps the drumbeat to fix the IRS had started a decade earlier with the first Taxpayer Bill of Rights (TBOR I)<sup>4</sup> and accelerated in 1996 with the Taxpayer Bill of Rights II (TBOR II),<sup>5</sup> but Senator Roth had definitely touched a nerve in painting a bullseye on the back of the IRS.

As the Chair of the Senate Finance Committee, Senator Roth called for hearings to highlight the abuses and to gather information necessary to identify the problems and find the solutions.<sup>6</sup> In 1996, Congress created the National Commission on Restructuring the Internal Revenue Service (Restructuring Commission), which was pursuing many of the same goals but without the high-profile political agenda.<sup>7</sup> At the same time, a scandal at

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<sup>3</sup> *60 Minutes: The I.R.S./Welfare a la Carte/Steals & Lies* (CBS television broadcast Sept. 21, 1997).

<sup>4</sup> Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342.

<sup>5</sup> Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452 (1996).

<sup>6</sup> See, e.g., *Congress gets ready to take a close look at IRS Hearings to include testimony by disguised agents, nightmare cases*, BALT. SUN, Sept. 21, 1997; *Senate Opens Hearings Into Alleged IRS Abuses*, WALL ST. J., Sept. 23, 1997; John Mintz, *Hearings on IRS Practices Open*, WASH. POST, Sept. 24, 1997.

<sup>7</sup> Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, § 637, 109 Stat. 468, 509. See generally *Report of the National Commission on Restructuring the Internal Revenue Service: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 105th Cong. (1997).

the White House left the administration of President William J. Clinton with very little voice to stop Senator Roth or to shape the agenda.<sup>8</sup>

In preparation for public hearings, Senator Roth and his staff identified ten cases of potential IRS abuse regarding collection matters. One of the ten cases arose in Virginia. The Senate Finance Committee issued subpoenas to an IRS Revenue Officer (RO) and her group manager based in Fredericksburg, Virginia. It also issued subpoenas to an IRS Revenue Agent (RA) and his group manager in Fairfax, Virginia. The Virginia-West Virginia District of the IRS, in which these four employees worked, was headed by a District Director located in Richmond. Upon receipt of the subpoenas, he called me looking for help.

We had two or three weeks between the receipt of the subpoenas and the day the employees were to appear in Committee chambers to testify. I asked the District Director to send me the file on the case so that I could review it and identify why the Committee would have selected this case. The District Director sent me the file almost immediately. The file surprised me. I could find nothing in the file that made the case extraordinary. I asked John McDougal and Chris Sterner, two of my IRS Chief Counsel colleagues in the Richmond office, to look it over as well, and they had the same reaction.<sup>9</sup> So, I was totally puzzled by the selection of this case.

In preparation for the meeting with the Senate staff, I met with the four employees. That meeting also did not clear up my confusion over the selection of this case. The taxpayer was a veteran and a former officer who had not filed income tax returns for several years. The IRS had filed returns on his behalf under the Substitute For Return (SFR) process, and had sent the

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<sup>8</sup> For a timeline of the key incidents in the Monica Lewinsky scandal involving President Clinton, see Olivia B. Waxman & Merrill Fabry, *From an Anonymous Tip to an Impeachment: A Timeline of Key Moments in the Clinton-Lewinsky Scandal*, TIME, May 4, 2018, <https://time.com/5120561/bill-clinton-monica-lewinsky-timeline/>.

<sup>9</sup> I was fortunate to work with two of the best attorneys in the IRS Chief Counsel's office. Chris Sterner went on to become the Deputy Chief Counsel, IRS, which is the top position a career attorney can hold. See a discussion of his career at Keith Fogg, *Retirement of a Friend and a Leadership Transition Impacting Tax Procedure*, PROCEDURALLY TAXING (May 24, 2016), <https://procedurallytaxing.com/retirement-of-a-friend-and-a-leadership-transition-impacting-tax-procedure/>. John McDougal went on to spearhead the IRS offshore program that brought in billions of dollars in tax previously hidden in tax havens, but that was only one of the many significant matters on which he worked while with Chief Counsel's Office. See a discussion of his career at Keith Fogg, *Retirement of a Friend and Driver Behind the IRS Offshore Program*, PROCEDURALLY TAXING (Dec. 1, 2016), <https://procedurallytaxing.com/retirement-of-a-friend-and-driver-behind-the-irs-offshore-program/>.

file for collection on the assessed liabilities. But, there was nothing unusual in the case. Because he subsequently filed delinquent returns, the IRS examination division got involved, looking at what amounted to a claim for abatement.

The day we were to appear in the Senate Finance Committee chamber, the four IRS employees and I went to Washington, D.C. and had an early morning meeting with the folks at the IRS National Office. The case from our district was the first one called into the meeting with the Senate staff. Just like us, the National Office folks were unsure exactly what to expect. They cautioned us about disclosure issues and other matters. I asked who from the National Office was going to join us. They all demurred. So, with the four employees from my district, I took a cab from 1111 Constitution Avenue (the IRS National Office building) to the Long Building on the Senate side of Capitol Hill.

When we arrived, we were ushered into a waiting room. Shortly after 10:00 a.m., the Committee staff called the RO into the chamber where there were four or five members of the Senate staff waiting to ask her questions. The RO was the perfect witness from my perspective. She had been an RO for some time. She had gray hair and a quiet demeanor. She came across more like someone who might be a grandmother than many people's idea of a fierce IRS collector. The Senate group introduced themselves, as did the RO and I. They then began to ask questions from a script that they had put together in preparation for the meeting.

It became clear from their questions that the group did not have a strong grasp on the job of a RO. I could also tell they were somewhat surprised by her demeanor, which did not fit their expectation. I interjected regularly to put their questions into context and to try to make their questions meaningful for this witness. The staffers began with a lengthy list of questions regarding collection issues, which the witness could generally answer with no problem, especially after I interjected in some instances to set the context for the questions. After the Committee staff finished with a long list of questions that related to IRS collection process, the staff then launched into a series of questions focused on the IRS examination of a return once the taxpayer had delinquently filed them. I explained to the group that these were questions that would be answered by the RA instead of the RO. But, the staff went through the list of questions anyway, with me responding as much or more than the RO who really knew nothing about this part of the case.

After about two hours with the RO, the committee staff dismissed the RO and called the RO's group manager (RO GM). The Committee staff went through the exact same list of questions. The RO GM was also a great witness who came well prepared; she had many of the same qualities as the RO—lots of experience, quiet demeanor, gray hair, and a warm personality. Like her colleague before her, she kept the discussion low-key. She did not get flustered or upset. Because this was the first case in which they were encountering IRS employees, I got the feeling the Senate staffers were continuing to be puzzled by the way the interviews were going.

At the conclusion of the RO GM's testimony, the group took a ten to fifteen minute break. This was my only break from this testimony before the Senate Committee staffers, which lasted from 10:00 AM to 6:00 PM. After the break, the Committee staff called the RA into the room. The role of the examination division, in this case, was not to examine the returns before assessment, since the assessments resulted from SFRs, but rather to review the returns the taxpayer filed after assessment to determine if the IRS should abate some, or all, of the liability assessed through the SFR process. In my review of the work in the case, I felt that the RA bent over backwards to assist the taxpayer and allow some items of a questionable nature. This case was not at all the kind of case in which the IRS had taken a hard-nosed approach and disallowed everything. That was one of the features of the case that puzzled me the most in its selection for this hearing.

The Senate Committee staffers started questioning the RA with the same questions they had asked to the RO and RO GM in the same order. I explained to them that this witness was not involved with the collection aspect of the case and was not in a position to answer the questions about collection action taken. Nonetheless, they went through the entire list with the RA answering question after question by saying that he did not know the answer. After getting through the collections questions, the RA did an excellent job of explaining what he did as a part of the examination process and why. He was followed by his group manager (RA GM), who received the exact same questions in the same order. I, of course, again explained why the RA GM would not know the answers to the collection questions.

At the conclusion of the questioning of the RA GM, I asked the staffers if there was any additional information they would like for me to obtain for them. I pointed out that their questions seemed to presume that they thought the taxpayer had timely filed his returns for the three years at issue and that the IRS had lost those returns, which caused all of his problems. I explained

to them that in my experience, it was possible that the IRS could lose a return and maybe even lose two returns, but for it to lose someone's returns for three years in a row would be a remarkable coincidence. I suggested to them that since the taxpayer came from Virginia, and since Virginia taxpayers had to essentially attach a copy of their federal return to their state return, I would obtain for them the filing records for the years at issue from the state. I explained that this was my standard practice when someone expressed to me that the IRS had lost their return because timely filing the Virginia return with the attached federal return would corroborate the story.

The staffers said it would not be necessary, but I felt it was. So, when I returned to my office the following day, I set in motion the request to obtain the state filing records of this taxpayer. It came as no surprise when I received them that he had not timely filed his state tax returns for any of the three years at issue. I wrote a letter to the staffers to transmit this information. Finding someone in Chief Counsel willing to sign the letter or let me sign the letter proved more of a challenge than I expected, but eventually, the letter was sent. We never heard further from the Senate Committee about this case. It was not one of the ones called for a public hearing.

It was a long day with the Senate Committee staffers, but I felt good about the outcome for my institutional client and for my four individual clients. As far as I could tell they had correctly worked the case, bent over backwards to assist someone who had not timely filed his tax return, and who now balked at paying taxes that he had the ability to pay. Though the IRS employees received no accolades for doing what they were supposed to do, I think they appreciated that we were able to show they had done nothing wrong and certainly nothing to showcase as an IRS abuse.

## II. THE CALL FROM THE CHIEF COUNSEL

The perception of almost everyone working at the IRS was that the public hearings before the Senate Finance Committee were designed to incite people against the IRS and lay the groundwork for legislation that could significantly alter tax procedure in a manner that would make it more difficult for the IRS to operate. At some point in the process as the legislative proposals began to arise, I received a call from Stuart Brown, the IRS Chief Counsel, asking me to draft legislation regarding collection matters that would assist taxpayers without creating significant problems for the IRS. He wanted legislation similar to the type of legislation passed in TBOR I in

1988<sup>10</sup> and TBOR II in 1996<sup>11</sup> that in large part codified practices that the IRS had already administratively adopted.<sup>12</sup>

I think the Chief Counsel call came on a Thursday with a request that we have something to them by early the next week. I sat down with Chris Sterner, the Assistant District Counsel in Richmond, whom I had first met almost fifteen years earlier when we taught new Chief Counsel attorneys the laws regarding federal tax collection. We were both knowledgeable about those laws, having worked closely with them for about two decades. We took out the Code and went section by section through the provisions regarding collection to brainstorm provisions that we thought would improve collection for taxpayers without radically impairing the IRS's ability to collect.

We came up with twenty-five ideas that we split up between the two of us and agreed to work on it over the weekend before pulling the proposal together Monday morning. On that Monday, we each came to the office with a reasonably developed explanation of our proposals, and we needed to pull the documents we had separately created together in order to send a proposal to the Chief Counsel. I cannot remember exactly what happened but that morning the word processing program in the office stopped working. While I was working with our computer specialist to troubleshoot the program, the Chief Counsel called asking where the proposals were. I had not expected that early next week meant first thing Monday morning, but I said I would get them to him shortly.

We got the word processing program to work and pulled together a document we were happy with by about noon when we sent it off to the Chief Counsel. Of the twenty-five proposals we sent, six made it into RRA 98. That was the first time I had ever directly made a legislative proposal, much less had one (several) accepted. While many of the provisions of RRA 98 did

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<sup>10</sup> Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342.

<sup>11</sup> Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452 (1996).

<sup>12</sup> A good example of this type of legislation is § 6159, enacted as a part of TBOR I, in which Congress codified the installment agreement. § 6234, 102 Stat. at 3725. IRS collection officers had worked with taxpayers for many years, probably decades, to give taxpayers installment agreements when taxpayers could not fully pay the liability. Codifying installment agreements definitely made a difference, as the IRS eventually recognized, but it did not radically alter the relationship between the IRS and taxpayers in collection matters.



radically change the makeup of the IRS collection function, Chris and I were both proud that we had a small imprint on the legislation.

### III. THE CASE WITH NINA OLSON

Chronologically, the case with Nina Olson, who went on to become the second National Taxpayer Advocate,<sup>13</sup> necessarily occurred before any of the other events described here, but not too long before. In the mid-1990s, Nina was the Director of the Community Tax Law Project (CTLP) based in Richmond, Virginia, which was the first non-academic low-income taxpayer clinic in the country.<sup>14</sup> I was the District Counsel in Richmond, heading up the office of about a dozen Chief Counsel attorneys stationed in that city.

CTLP and Nina came to every Tax Court calendar call in Richmond so that they could assist unrepresented taxpayers. At one of the calendar calls in the mid-1990s, CTLP picked up a client who had a several million dollar deficiency which included a fraud penalty. The client had once run an insurance business of some type but had been convicted of some crime related to the operation of the business. The conviction caused him to go to jail and the business was lost along with all of his other assets. So, we had a high-dollar deficiency case with a taxpayer recently released from incarceration who clearly could not pay a liability of that size, or of almost any size.

Because it was a fraud case with fairly complicated financial transactions underlying the proposed deficiency, we estimated it might take three weeks to try. A trial of that length would have totally tied up Nina's office and significantly tied up the Richmond Chief Counsel Office. Since winning the case would not bring in much, if any, revenue, I was unexcited about trying this case. I spoke to the attorney assigned about proposing an offer in compromise to the taxpayer and he agreed. So, we went to Nina and pitched that we should not go to trial but rather reach a collection settlement. We proposed that her client agree to the full deficiency and we agree to a modest payment.

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<sup>13</sup> I.R.S. News Release IR-2001-6 (Jan. 12, 2001).

<sup>14</sup> For background on Nina and the Community Tax Law Project, see T. Keith Fogg, *Every Taxpayer Counts: Nina Olson's Impact on Low-Income Taxpayer Clinics*, 18 PITT. TAX REV. 53 (2020); Keith Fogg, *Taxation with Representation: The Creation and Development of Low-Income Taxpayer Clinics*, 67 TAX LAW. 3, 21–28 (2013).

Nina liked the idea, but not my view of a modest payment. She felt he should have to pay no more than a nominal amount because he had nothing and no prospects of significant future income. I felt a nominal amount was insufficient because, in part, it was not worth our time and effort. We eventually reached an agreement at some amount that made us both unhappy, which must have made it a good settlement.

Shortly thereafter, she went before Congress as part of the hearings leading up to RRA 98 and testified about how to make the IRS a better place. Part of her testimony led to the creation of § 7526 and the grant funds for low-income tax clinics.<sup>15</sup> Another part of her testimony concerned offers in compromise and the position of the IRS. She had realized from our encounter that low-income taxpayers must pay a minimum amount in order to obtain an offer. She felt this minimum created a barrier that kept many low-income taxpayers from obtaining an offer. Congress agreed and passed § 7122(c)(3)(A) (now § 7122(d)(3)(A)), which provides that “an officer or employee of the Internal Revenue Service shall not reject an offer-in-compromise from a low-income taxpayer solely on the basis of the amount of the offer.”<sup>16</sup>

While causing the creation of legislation in this way was not as satisfying as the legislation created as the result of the proposals by Chris Sterner and me, I feel very connected to this provision since I know exactly what led to its creation. Since I have practiced as a director of a low-income taxpayer clinic for fifteen years, submitting a few hundred offers in compromise for low-income taxpayers, I can say that it has turned out to be one of the most beneficial changes to the Code in 1998 for my clients and the one I use the most.

#### IV. THE AFTERMATH OF RRA 98

The legislation passed on July 22, 1998.<sup>17</sup> A large amount of the legislation impacted the way the IRS collects taxes and information. The code sections impacted were assigned to the General Litigation Division of Chief Counsel’s national office. That division became responsible for writing

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<sup>15</sup> § 3601, 112 Stat. at 774.

<sup>16</sup> § 3462, 112 Stat. at 764–65.

<sup>17</sup> 112 Stat. 685.

the regulations to implement the legislation. The legislation, or large parts of it, were due to become effective six months after enactment and that included the CDP provisions, which brought the most radical changes to collection.

The Director of the General Litigation Division of Chief Counsel had recently left. The Chief Counsel requested that I come up to D.C. and head up the division during the fall of 1998 to work through all of the changes that needed to occur. From 1988 to 1992, I had worked in this division as a branch chief. I was knowledgeable about the types of issues handled by this division and I was willing to do so on a temporary basis. I had promised my family that we would not move from Richmond while my children were still in high school and I had sons in the eighth and tenth grades. So, I had a long fall commuting back and forth each week between Richmond and D.C. While the cities are only one-hundred miles apart, it took Abraham Lincoln four years to get there, and sometimes it can feel like it takes that long driving from one city to the other.<sup>18</sup>

I met every day with Jerry Sekula, the attorney writing the Collection Due Process regulations. Jerry and I met a couple times a week with my boss, Eliot Fielding, to discuss how this regulation was coming, go over our thinking on some of the issues, and make policy decisions. Eliot and I met regularly with Stuart Brown, the Chief Counsel, because of the importance of the CDP regulations. In addition to that regulation, Bryan Camp was writing a regulation on information the IRS had to provide to others, and we had other regulation projects going on, as well as constant requests for guidance related to the new provisions and the old.

The experience of heading up the Chief Counsel General Litigation Division in the Fall of 1998 as the IRS tried to absorb all of the procedural changes created by RRA 98 was the most intense working experience of my career. The attorneys in the division knew that their expertise, which sometimes seemed an afterthought to tax administration, had come to the forefront. They all worked hard so that we could get the regulations out in time to provide needed guidance before the new laws went into effect. We made it, but just barely.

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<sup>18</sup> My explanation of the reason it is so difficult to get from Washington, D.C. to Richmond is that the road was designed by engineers who are the descendants of the Southerners who fought so hard to keep the Northerners from Richmond and they are simply carrying on the tradition.